IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JESSE C. TRENTADUE, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, et al. Defendants.	Civ. A. No. 2:08-CV-00788

THIRD SUPPLEMENTAL DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), formerly at Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C., and now relocated to Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 21, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the state of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 277 employees who staff a total of ten (10) units and two field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for

access to FBI records and information pursuant to the FOIA; Privacy Act; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment which has been afforded by the FBI in responding to plaintiff's October 12, 2008 FOIA request.

(4) This declaration is being submitted pursuant to the Court's Order dated May 13, 2011, and supplements and incorporates the information previously provided in the declarations of David M. Hardy, dated July 16, 2010 ("Hardy Declaration") September 15, 2010 ("Supplemental Hardy Declaration"), and January 28, 2011 ("Second Supplemental Hardy Declaration).

REAFFIRMATION

(5) I affirm that I have not misrepresented information or provided incomplete or otherwise misleading information to the court under an asserted right to protect the interests of the United States.

EVIDENCE CONTROL CENTER - FBIHQ

(6) There is not an Evidence Control Center, or any similar repository of physical evidence called by any other name, at FBIHQ.

EVIDENCE CONTROL ROOM - OKLAHOMA CITY FIELD OFFICE

(7) The Oklahoma City Field Office ("OCFO") has designated an external warehouse as the place where all material related to the OKBOMB investigation is stored. All material indexed in the OKBOMB file, 174A-OC-56120, is in this warehouse. The OKBOMB Warehouse contains both documentary files and an Evidence Control Room ("ECR"), where all physical evidence related to OKBOMB is stored. The ECR is a separate room within the Warehouse. As described in the Second Supplemental Hardy Declaration, OCFO performed a manual search of the physical evidence in the ECR within the OKBOMB Warehouse, during the week of October 18, 2010, for additional tapes responsive to plaintiff's FOIA request; however, this manual search did not locate any additional responsive tapes. Specifically, no tapes from the Murrah Building, and no additional Hanger tape, were located. See Second Supplemental Hardy Declaration, ¶ 5.

(8) OCFO also has a separate ECC located on-site. That ECC contains no material pertaining to the OKBOMB investigation. Rather, all material pertaining to the OKBOMB investigation is located at the OKBOMB Warehouse, the location specifically designated to house all materials related to the OKBOMB investigation.

FBI CRIME LAB

(9) Following the Court's Order of May 13, 2011, RIDS personnel contacted the FBI Crime Lab at Quantico, Virginia, to determine whether the Evidence Control Room located at the Crime Lab contained OKBOMB tapes. The Crime Lab performed a manual search for OKBOMB videotapes, and did not locate any videotapes related to the OKBOMB investigation during this search. Specifically, no videotapes from the Murrah Building, and no additional Hanger tape, were located during this search.

MANUAL SEARCH OF PHYSICAL FILES LOCATED AT THE ECC LOCATED AT FBIHQ, OCFO, AND THE CRIME LAB FOR TAPES AND MATERIAL COLLECTED DURING THE FIRST 14 DAYS FOLLOWING BOMBING

(10) Manual searches have been performed at the OKBOMB Warehouse ECR located at OCFO and the Crime Lab ECC. See ¶¶ 7-9. Additionally, there is no ECC located at FBIHQ. See ¶ 6. Upon querying the FBI Crime Lab, my staff was informed that it maintains no paper files related to the OKBOMB investigation as it was told by FBIHQ to forward all OKBOMB material to OCFO for inclusion in the main OKBOMB file.

(11) The OKBOMB investigation was one of the largest investigations in the FBI's history. The OKBOMB Warehouse at OCFO is currently the sole designated repository for all records and evidence related to that investigation. The OKBOMB files at the OKBOMB Warehouse have been gathered not only from OCFO but from FBIHQ, the Crime Lab, and other field offices. Some of the paper files that came from outside OCFO have been integrated in OCFO files, but other paper files are separate. Moreover, none of this material is arranged strictly in chronological order based on when the material was collected. Rather, within the many different sections of the paper files, the documents are arranged by serialization number, which are given sequentially in the order that a document is serialized. Because of the urgency and magnitude of the OKBOMB investigation, particularly in the immediate aftermath of the bombing, many documents were not serialized in the chronological order that material was collected. Thus, documents referencing evidence collected during the first 14 days of the OKBOMB investigation could be anywhere in the paper files in the OKBOMB Warehouse. For purposes of responding to the Court's Order, I obtained an estimate from OCFO staff that the documents serialized during the first 14 days following the OKBOMB investigation (which, for

the reasons explained, are not the only documents that might reference evidence collected during the first 14 days) comprise 189 linear feet of material. OCFO staff obtained this estimate by using May 5, 1995, as the cutoff point and measuring the physical length of files serialized up to that date. Not all of this information is in one physical location of the main file itself; this estimate also includes the first 14 days of serialized material in other, physically separate, subfiles and sections of material collected from locations other than OCFO, which OCFO staff measured separately and included in this estimate. Assuming there are 200 pages per inch of material, there are approximately 450,000 pages of documents. Based on my knowledge of search procedures and my experience responding to FOIA requests submitted to the FBI, a manual search of this material would be extremely time consuming and unprecedented in the history of the FBI FOIA program. I estimate that a manual search of this amount of material would take over a year and a half, assuming that one employee was able to search approximately 800 pages per day. If required by the Court, such an undertaking would force my office to divert significant resources from other obligations of the FBI's FOIA program and from other pending FOIA litigations. And as I explained, this search would not cover all documents that might reference evidence collected during the first 14 days of the investigation.

(12) In addition, a manual search of these files is not likely to locate any additional responsive material. As I have previously explained, the computerized searches that were conducted of the ACS and ZyIndex systems were not only the most efficient way to find responsive material, but also the method that was most likely to locate responsive material. In fact, the computerized searches of ACS and ZyIndex that we have already conducted were the only reasonable method of locating responsive material. The physical documents in the

OKBOMB warehouse are already indexed in ACS and uploaded in ZyIndex. Unlike a manual search of paper files, electronic searches of ACS and ZyIndex are able to cover all indexed material regardless of when it was serialized. While there is always a remote possibility that a particular document may not have been indexed, through mistake or oversight, I do not understand the FOIA to require an extremely burdensome manual search, that is redundant of computerized searches that have already been conducted, on the remote chance that the search might lead to some record that has not yet been found.

(13) I understand that the Court has expressed concern about possible "gaps" in the FBI's Central Records Systems. However, there are no "gaps" that would be relevant in this instance. The kinds of material that would not be indexed or uploaded in the CRS and ACS would *not* include material related to evidence collected during the OKBOMB investigation. To the contrary, CRS and ACS are where the FBI electronically files and indexes *all* material that it deems relevant to investigations and possible prosecutions. Documents that reference evidence that might be needed for purposes of an investigation or for trial, or chain of custody for that evidence, are one category of documents that would always be considered relevant for these purposes, so these documents – absent the remote possibility of mistake – would always be indexed in ACS. Thus, when the FBI needs to locate such material for its own purposes, in the course of an investigation or when assisting prosecutors in a criminal prosecution, FBI personnel conduct searches for such material in ACS – the very same kind of search that was conducted here – because that is the system that the FBI relies on for this purpose.

(14) I am aware that the plaintiff submitted a declaration from a former FBI agent giving his opinion that a certain document had not been indexed in ACS because the copy that he

saw did not contain certain markings. However, the FBI located the very document this individual was considering through the electronic search that I described in my original declaration, and the plaintiff received this document in the material that the FBI provided to him as the results of that search. The other documents that the plaintiff received were also located through this same electronic search, even though they likewise lack the markings that the plaintiff's declarant described. I am aware that, at the hearing that this Court held, the plaintiff circulated an exhibit that included other FBI records that were not provided as a result of the FOIA request at issue. Having examined this exhibit, I have observed that those records did not reference videotapes taken from the locations that the plaintiff had identified in his FOIA request. The fact that the plaintiff did not receive these records in response to his request simply reflects the fact that these records were not responsive to the plaintiff's request. I have no reason to think that those records cannot be found through an electronic search, if the records were responsive to the search that was conducted.

I-DRIVE SEARCH

(15) The letters "I" and "S" are letters assigned to a drive or portion of a drive on a server. At the time of the OKBOMB investigation, the I-Drive was known as the "Drafts" drive and used as a temporary working folder for electronic media. The I-Drive temporarily stored electronic media prior to its final approval. Once final approval was received, the material was added to the official investigative case file, which includes indexing the material in ACS, the FBI's automated system, and it was at the same time deleted from the I-Drive. In 2001 (due to pending criminal proceedings), all field offices, including OCFO, were instructed to perform comprehensive searches of their I-Drive for all OKBOMB investigative material. Any

information located through these I-Drive searches was forwarded to OCFO personnel for comparison with the information entered or uploaded into the FBI's automated systems (i.e., ZyIndex and ACS). Any records that were not already included in the ZyIndex and ACS files were added to those files at that time. Therefore, any information that previously could have been found on the I-Drive that was potentially responsive to plaintiff's request would now have been located through the automated searches of ZyIndex and ACS that the FBI has already conducted.

(16) Since OKBOMB, the FBI has changed its operating system and servers. They now have a different design. The I-Drive that was used over 16 years ago during the OKBOMB investigation no longer exists. The FBI currently has an S-Drive, known as a common drive or shared drive. At the time of the system and server upgrades, old server information was migrated to the new servers after careful examination by all FBI personnel to ensure all migrated data was current. This migration was after the 2001 comprehensive searches as noted in ¶15. Therefore, there is no reason to believe that the S-Drive could contain any material responsive to the plaintiff's request.

JUNE MAIL

(17) To the extent plaintiff suggests that the FBI has a separate repository known as "June Mail" that may contain OKBOMB material (i.e., videotapes), he is incorrect. The designation of "June Mail" has not been used since November 1978, over fifteen years before the OKBOMB investigation took place. This designation had been established in June 1949 to identify certain information, received from or relating to the Bureau's most sensitive sources and highly confidential or unusual investigative techniques, including electronic surveillance, that was determined at the time to require separate filing procedures. Before the June Mail

designation was discontinued, all such material was indexed into the general file. At the time of the OKBOMB investigation, such material would have been filed the same way as other investigative material, and it would have been located through the same electronic search that I described in my earlier declarations. See Hardy Declaration ¶¶ 27-39; Supplemental Hardy Declaration ¶¶ 5-9.

ZERO FILES

(18) Plaintiff suggests through an affidavit by Ricardo Ojeda that the FBI uses the designation of "zero files" to hide information that it does not want to disclose to the defense during a prosecution. That is not an accurate description of the "zero" designation. The designation of " Zero file" relates to the general file in a particular category and is principally used for complaints and miscellaneous nonspecific data that does not relate to a file classification that already exists and is of such a nature that it does not warrant establishing a separate case file. For example, the FBI uses the general file category 174- for bombing investigations. The OKBOMB file is therefore designated as 174A-OC-56120. The Zero file for this file category is 174-0. This file may contain communications, unrelated to any specific bombing investigation that already has a specific classification, that are indexed for retrievability purposes. Each communication of this type is filed serially in the zero file. When it is noted that three or more pieces of correspondence on the same subject have accumulated in the zero file, a separate file number is established within the classification to designate that specific subject. Additional information on that same subject matter (e.g., OKBOMB) is then channeled into the specific file for greater efficiency. Because the OKBOMB investigation already has a separate file number, 174A-OC-56120, which was created immediately upon the start of the OKBOMB investigation,

the Zero file for the bombing investigation category is not likely to contain information related to the OKBOMB investigation.

EXTRAORDINARY SEARCHES

(19) I have provided a detailed description of the FBI's Central Records System and the searches that were conducted under my supervision to locate material responsive to plaintiff's FOIA request at issue before the court. (See Hardy Declaration, ¶¶27-39 and Supplemental Hardy Declaration ¶¶5-9.) The FBI has performed automated searches of the Central Records System through the General Indices; performed additional extraordinary searches by using a specialized software tool called ZyIndex; performed a manual search of the OKBOMB warehouse (OCFO's ECC); and performed a manual search of the ECC at the FBI's Crime Lab.

(20) The FBI has gone above and beyond its routine practices to locate any and all material responsive to plaintiff's FOIA request. The FBI's searches have been adequate and reasonable. While it is always a possibility that responsive documents might have been misfiled and thus could be located somewhere other than in the OKBOMB file (though it would be impossible to know where), I am not aware that this is the case, and a reasonable search did not and would not locate any such documents (if they exist) because they would not be in a location likely to contain responsive documents. Having reviewed all of plaintiff's filings in this case, I continue to attest that all locations likely to contain information responsive to plaintiff's FOIA request have been searched and all responsive information that was located through these searches has been provided to plaintiff. I also continue to attest that the electronic searches that occurred were the most effective and most efficient method of locating any information responsive to plaintiff's request. I am unaware of the existence or likely location of additional

tapes responsive to the plaintiff's FOIA request, including tapes from the Murrah Building or any additional Hanger tape other than the tape that plaintiff already received, and do not know of anyone who would know where additional tapes would be located.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30 +/- day of June, 2011.

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia